

ORIGINAL

Supreme Court, U.S.

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JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES
October Term 1989

Case No. 89-5961 (5)

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SUPREME COURT, U.S.

ROBERT LACY PARKER

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections, and
ROBERT A. BUTTERWORTH, Attorney General,
State of Florida

Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF
REGARDING QUESTION 1 (JURY OVERRIDE ISSUE)

ROBERT J. LINK, ESQUIRE
SAALFIELD, CATLIN, COULSON,
STOUDEMIRE & ETHERIDGE
Florida Bar #200743
121 West Forsyth Street
Suite 1000
Jacksonville, Florida 32202
(904) 355-4401

QUESTIONS PRESENTED

Is the application of Florida's jury override standard in an individual case subject to an Eighth Amendment review, and, if so, what standard of review is applicable?

TABLE OF CONTENTS

QUESTIONS PRESENTED	1
TABLE OF AUTHORITIES	iii
CONCLUSION	7
CERTIFICATE OF SERVICE	7

TABLE OF AUTHORITIES

CASES

<u>Clemons v. Mississippi</u> , 110 S.Ct.1441 (1990)	1, 3-7
<u>Eddings v. Oklahoma</u> , 455 U.S.104 (1982)	5
<u>Lockett v. Ohio</u> , 438 U.S.586, 98 S.Ct.2954, 57 L.Ed.2d 973 (1978)	4, 5
<u>Parker v. Dugger</u> , 876 F.2d 1470 (11th Cir.1989)	4
<u>Parker v. State</u> , 458 So.2d 750 (Fla.1984)	3
<u>Spaziano v. Florida</u> , 468 U.S.447, 104 S.Ct.3154, 82 L.Ed. 2d 340 (1984)	3
<u>Tedder v. State</u> , 322 So.2d 908 (Fla.1975)	3

OTHER AUTHORITIES

Fla.Stat. §921.141	4
Section 921.141(2), Florida Statutes (1981)	2
Section 921.141(3), Florida Statutes (1981)	2

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In Clemons v. Mississippi, 110 S.Ct.1441 (1990), this Court held that the Eighth Amendment does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly defined aggravating circumstance either by re-weighing of the aggravating and mitigating evidence, or by harmless error review. However, this Court also noted that, in a state whose death penalty scheme requires the weighing of aggravating circumstances against mitigating circumstances, the Eighth Amendment prohibits the automatic affirmance of a death sentence simply because there are one or more remaining valid aggravating circumstances. Clemons, *id.*, at 1450. In Clemons, this Court vacated the judgment and remanded to the Mississippi Supreme Court for clarification as to whether the Mississippi Supreme Court had applied a harmless error analysis in affirming the death sentence, or whether the court had utilized a re-

weighing process. In doing so, this Court recognized that the application of the harmless error rule to Mr. Clemons was subject to an Eighth Amendment arbitrariness challenge. Id. at 1451.

Florida, of course, is a "weighing" state. Florida law requires that the jury render an advisory sentence based upon three factors: (a) whether sufficient aggravating circumstances exist, (b) whether sufficient mitigating circumstances exist which out-weigh the aggravating circumstances found to exist, and (c) based on these considerations, whether the defendant should be sentenced to life imprisonment or death. Section 921.141(2), Florida Statutes (1981). Florida law further requires that the trial court judge, after receiving the recommendation of the jury, also weigh the aggravating and mitigating circumstances and determine if there are sufficient aggravating circumstances to justify a sentence of death, and that there are insufficient mitigating circumstances to out-weigh the aggravating circumstances. Section 921.141(3), Florida Statutes (1981). In Mr. Parker's case, the jury was not only instructed in accord with Florida law, but was also provided a specific verdict form which required it to find, first, whether sufficient aggravating circumstances existed to justify a sentence of death, and, second, to find whether sufficient mitigating circumstances existed which out-weighed any aggravating circumstances (A-8). The trial court judge, in overruling the jury's recommendation of life imprisonment, found that "there are no mitigating circumstances that out-weigh the aggravating circumstances" (A-7).

In reviewing the jury override death sentence imposed upon petitioner, the Florida Supreme Court found that two of the aggravating circumstances found by the trial court judge were invalid, including the "felony murder" aggravating circumstance and the "heinous, atrocious and cruel" aggravating circumstance. Parker v. State, 458 So.2d 750, 754 (Fla.1984). As this Court has stated in Clemons, the proper procedure for the Florida Supreme Court at this point should have been for the appellate court to either re-weigh the aggravating and mitigating circumstances, or to apply a harmless error analysis. The harmless error analysis, requires a finding that beyond a reasonable doubt the sentence would have been the same even without the improperly found aggravating circumstances. Clemons, id., at 1451. The Florida Supreme Court's entire discussion of the matter, however, was as follows:

The trial court found no mitigating circumstances to balance against the aggravating circumstances, of which four were properly applied. In light of these findings the facts suggesting the sentence of death are so clear and convincing that virtually no reasonable person could differ. Tedder v. State, 322 So.2d 908 (Fla.1975). The jury override was proper and the facts of this case clearly place it within the class of homicides for which the death penalty has been found appropriate. Spaziano v. Florida, 468 U.S.447, 104 S.Ct.3154, 82 L.Ed. 2d 340 (1984).

Accordingly, the sentence of death is affirmed. Parker, id., at 754-5.

The contention here is that the Florida Supreme Court has arbitrarily applied the Tedder standard to affirm Mr. Parker's death sentence. The impression given from a reading of the Florida Supreme Court language quoted above is that the court affirmed the

death sentence simply because there were four aggravating circumstances and no mitigating circumstances. It appears to be either an automatic affirmance of the sort condemned in Clemons, or a harmless error analysis based upon a "clear and convincing" standard as opposed to a "beyond a reasonable doubt" standard. In either event, the analysis would be constitutionally flawed under Clemons.

However, the Eleventh Circuit Court of Appeals interpreted the above-quoted language to mean that the Florida Supreme Court "held that the remaining four statutory aggravating circumstances sufficiently out-weighed the mitigating circumstances to justify the trial court's decision to override the jury's recommendation." Parker v. Dugger, 876 F.2d 1470, 1473 (11th Cir.1989). Despite the Florida Supreme Court's pronouncement that there were no mitigating circumstances to weigh against the aggravating circumstances, the Eleventh Circuit found that there were numerous non-statutory mitigating circumstances that were considered and weighed by the trial court judge:

The trial of this case occurred after Lockett v. Ohio, 438 U.S.586, 98 S.Ct.2954, 57 L.Ed.2d 973 (1978) (requiring consideration of non-statutory mitigating circumstances) was decided and Fla.Stat. §921.141 was amended to require Florida trial courts to consider non-statutory mitigating circumstances. Given this and the fact that the trial judge listened to copious evidence of non-statutory mitigating circumstances presented by Parker during the sentencing phase, we are convinced that the trial judge did in fact consider and weigh non-statutory mitigating circumstances before deciding to sentence Parker to death. Parker v. Dugger, id., at 1475 n.7.

From the foregoing, there appear to be serious infirmities with Petitioner's death sentence. Under Clemons, the Florida Supreme Court could not automatically affirm the death sentence simply because there were four aggravating circumstances and no mitigating circumstances. If the Florida Supreme Court applied a harmless error analysis, it apparently utilized a clear and convincing evidence standard of review as opposed to the constitutionally required beyond a reasonable doubt standard. Finally, if the Florida Supreme Court re-weighed the aggravating and mitigating circumstances, it failed to consider the "copious evidence of non-statutory mitigating circumstances" in the weighing process, because it interpreted the trial judge's findings to be that there were no mitigating circumstances.

If the Florida Supreme Court applied a harmless error analysis here, it should be required to say so, and to apply the correct standard of review. If the Florida Supreme Court re-weighed the aggravating and mitigating circumstances here, it must be required to consider the mitigating circumstances that were presented at the trial court level. If the Florida Supreme Court failed to consider the mitigating circumstances that the Eleventh Circuit Court of Appeals found that the trial court judge considered, then the re-weighing conducted by the Florida Supreme Court would itself violate the dictates of Lockett v. Ohio, 438 U.S.586 (1978), and Eddings v. Oklahoma, 455 U.S.104 (1982). The language utilized by the Florida Supreme Court in affirming Mr. Parker's death sentence is, if anything, even more "cryptic" and "unclear" than the

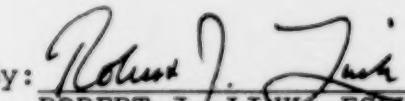
language from the Mississippi Supreme Court that affirmed the death sentence in Clemons. Certiorari should be granted.

CONCLUSION

The decision of the Florida Supreme Court in affirming Petitioner's death sentence is inconsistent with the decision of this court in Clemons v. Mississippi. This Court should grant certiorari to consider the application of Clemons to the decision of the state supreme court in Mr. Parker's case.

Respectfully submitted,

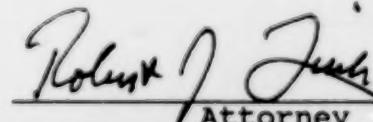
SAALFIELD, CATLIN, COULSON,
STOUDEMIRE & ETHERIDGE

By: 
ROBERT J. LINK, ESQUIRE
Florida Bar No. 200743
121 W. Forsyth Street
Suite 1000
Jacksonville, Florida 32202
(904) 355-4401

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mark Menser, Esquire, Assistant Attorney General, The Capitol, Tallahassee, FL 32301 by Mail, this 2 day of May, 1990.


Attorney